SUPREME COURT, U. S.

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No. 487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NATIONAL DAIRY PRODUCTS CORPORATION,
Petitioner,

v.

FEDERAL TRADE COMMISSION

REPLY BRIEF FOR NATIONAL DAIRY PRODUCTS CORPORATION ON PETITION FOR A WRIT OF CERTIORARI

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TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

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As grounds for issuance of a writ of certiorari, petitioner urged that, by rejecting "per purchaser" cost justification of discounts to food chains in favor of a "store-by-store" costing requirement, the Federal Trade Commission and the Court of Appeals for the Seventh Circuit established an artificial and non-objective standard; that, in so doing, they disregarded the plain meaning of the cost justification proviso of Section 2(a) of the Robinson-Patman Act, ignored the principle that cost justification is an absolute defense to a charge of price discrimination, and departed from well established and commonly accepted interpretations of the proviso. In addition, petitioner urged that the Court of Appeals erred in applying the Finality Act of 1959 to a proceeding initiated by the Commission in 1957. The Brief for the Federal Trade Commission in Opposition[1] either fails entirely to meet petitioner's arguments,

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1. Hereinafter cited "G.B. . . ."

or answers them in oblique or inadequate fashion. The main thrust of the Brief in Opposition is that the holdings which petitioner claims are erroneous are not ripe for review by this Court. Accordingly, petitioner will not further argue the substantive matters which are raised in its petition and left substantially unanswered by the Brief in Opposition, but will direct this reply brief to the ripeness question.

One of the primary matters litigated in this case was whether or not petitioner may cost justify its discounts to corporate chain customers on a "per purchaser" basis.[2] In its decision, the Federal Trade Commission categorically held that discounts to such multi-unit chains "must be cost justified on a store-by-store basis,"[3] and the Court of Appeals for the Seventh Circuit, upholding the Commission's order, observed that there is no difference from the cost standpoint "whether . . . [a] store is part of a group or chain or an independent."[4] Although recognizing these facts, the Brief in Opposition urges that the only remaining cost question presented is whether or not discounts to "cooperative or voluntary buying groups" must be cost justified on a store-by-store basis (G.B. 1-2, 7-8).

In substance, therefore, it is the government's position that the question presented by petitioner—*i.e.*, whether for cost justification purposes it is "the seller's cost of serv-

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2. The complaint challenged petitioner's allowance of discounts to chains and buying groups "without regard to the monthly volume of purchases of . . . individual stores . . ." (See Appendix to Petition for a Writ of Certiorari [hereinafter cited "Pet. . . ."], p. A-86).

3. See Pet. A-40; see also *id.* at A-38 — A-39, A-41 — A-42.

4. Pet. A-13. The Court of Appeals indicated that, even though petitioner's intra-state competitors might "continue to grant averaged discounts to chains" while petitioner could not, petitioner could meet their prices under "the meeting competition defense" (Pet. A-13 — A-14).

ing . . . a chain as a single 'purchaser' "[5] that is to be taken into account—is not ripe for decision. The government is clearly wrong in this regard. The question which petitioner has presented is not only ripe for decision in this case under well established administrative law standards, but it is of the utmost importance to the business community as well as to those responsible for administering the Robinson-Patman Act that this question be settled now.

1. The present case meets the two tests of the "ripeness doctrine" in that the "per purchaser" versus "store-by-store" cost determination issue is now appropriate for judicial determination, and a denial thereof would cause severe hardship to the petitioner. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167, 170 (1967). In *Abbott Laboratories*, this Court pointed out (387 U.S. at 148-49) that the basic rationale of the "ripeness doctrine" is to prevent the courts,

> "through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."

The Commission's position requiring store-by-store cost justification by corporate chains has been "formalized" not only in its July 1966 decision in the instant case but in an advisory opinion issued and published in October 1967.[6]

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5. See Pet. 2.

6. Advisory Opinion Digest No. 145, TRADE REG. REP. ¶ 18,083 (1967). Explaining its ruling that cost justification by a centrally-owned chain of three retail grocery stores must be "on a store-by-store basis," the Commission noted that "[s]ince independent and singly owned retail stores are served in identically the same manner, it [per-purchaser costing] would confer an advantage on the

Clearly, therefore, what is now before the Court is no "abstract disagreement."

Moreover, here, as in *Abbott Laboratories,* the question to be decided is fundamentally a legal one, *i.e.,* a matter of statutory construction, including the meaning of the terms "purchaser" and "cost" as used in the cost justification proviso of Section 2(a), and whether or not the defense of cost justification is an absolute defense to a charge of 2(a) violation (see Pet. 8-13). Certainly, these are questions ultimately to be decided by this Court, and they are ripe for decision on this record.

It is equally clear that denial of review in this case would place petitioner in a serious dilemma, and no matter what course it elected to follow, it would be subjected to severe hardship.

If this Court should deny certiorari, there can be no question whatsoever that in all areas of the United States in which petitioner sells milk and ice cream, the Commission would attempt, as a part of its compliance procedure, to require that petitioner's chain discounts be cost justified "on a store-by-store basis."

Were petitioner to comply with this ruling, its pricing flexibility would be curtailed. It would be placed at a competitive disadvantage not only with intra-state com-

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multi-unit store, not by virtue of any savings in cost to the store but solely by reason of its membership in the centrally owned organization" (*ibid.*). Just as in the instant case, that opinion in effect substitutes "delivery point" for "purchaser" in the cost proviso, and it ignores the fact that a seller has an absolute defense to a charge of price discrimination if his discounts "make only due allowance for differences in the cost of . . . sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered" (Pet. 3).

petitors not subject to the Robinson-Patman Act, but with the Borden Company, one of its principal competitors, which is operating under a United States District Court decree that permits "per purchaser" costing,[7] and with other inter-state competitors who interpret the decisions in the instant case (consistent with the government's contentions) as leaving the issue unsettled.

Of course, petitioner could initiate a new proceeding, contesting in the courts the Federal Trade Commission's demand that it comply with the order herein by adopting "store-by-store" costing for chains.[8] Or it could refuse to comply and take its chances in a penalty proceeding brought by the Commission. But there is no certainty that petitioner could get a determination on the merits of the question it now presents, for the Commission certainly would urge, under the rule of *FTC* v. *Ruberoid Co.*, 343 U.S. 470 (1952), that petitioner has had its day in court on this question — that it

> "cannot again interpose the same defense upon substantially similar facts when the Commission seeks to show that its order has been violated. The same result follows where the evidence supporting the defense, although not produced in the previous proceedings, was then available to the seller . . . [T]he seller . . . may plead only those facts constituting statutory justification which it has not had a previous opportunity to present." (*Id.* at 476-77)

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7. See Pet. 14. The Brief in Opposition thus is completely in error in suggesting that "petitioner has been allowed to use averaging methods to the extent that *Borden* holds them proper . . ." (G.B. 13).

8. See Abbott Laboratories v. Gardner, 387 U.S. 136, 149-51 (1967); Gardner v. Toilet Goods Ass'n, 387 U.S. 167 (1967); FTC v. Nash-Finch Co., 288 F.2d 407 (D.C. Cir. 1961); Elmo Division v. FTC, 348 F.2d 342 (D.C. Cir. 1965).

In summary, the situation here is very like that which the Court described in *Abbott Laboratories* (387 U.S. at 153):

> "It is relevant at this juncture to recognize that petitioners deal in a sensitive industry, in which public confidence in their drug products is especially important. To require them to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily. Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to non-compliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance, neither of which appears here."

The instant proceeding was begun more than ten years ago. The record shows that, in its efforts to achieve definitive standards in compliance with the cost justification proviso, petitioner spent over $450,000 on detailed, far-ranging cost studies. It should not now be turned away to seek a definitive ruling on the "per purchaser" versus "store-by-store" issue in a further expensive, and doubtless protracted, cycle of litigation.

2. The public interest will best be served by a determination now of the question which petitioner has presented. Generally accepted statistics on food store sales indicate that corporate chains account for some 42% of the value of all such sales on a national basis,[9] Many products aside from milk and ice cream are store-door delivered. Pur-

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9. See PROGRESSIVE GROCER, 35TH ANNUAL REPORT OF THE GROCERY INDUSTRY 236 (April 1968).

veyors of such other products, as well as milk and ice cream companies, the corporate chains themselves, and the lower courts as well as administrative authorities responsible for determining Robinson-Patman Act cost-justification questions, require clarification of the serious and sensitive question here presented with respect to pricing to corporate chains.

But there is also a real public interest in a decision by this Court as to whether wholesaler sponsors and cooperative headquarters which buy for their voluntary and cooperative member stores are entitled to be treated as "purchasers" for cost justification purposes—as Congress appears to have intended (see Pet. 9 n. 12).[10] It will not do for the government simply to argue that a store which is a group member may wind up with a larger discount than a competing independent store of like size and that this is "contrary to the basic purpose of the Robinson-Patman Act" (G.B. 10). "Per purchaser" costing and pricing, by definition, involves payment of discounts not in excess of a seller's cost savings in serving a particular purchaser.[11] Thus, if a small storekeeper-member ultimately receives from his group headquarters a discount larger than he individually "earned," a bigger fellow member quite clearly must receive a discount smaller than he individually

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10. The National Commission on Food Marketing credits the voluntary and cooperative group movement for the survival of independent wholesale and retail food merchants. ORGANIZATION AND COMPETITION IN FOOD RETAILING 37-38 (Tech. Study No. 7, June 1966).

11. The Commission recognized in its decision in the instant case that petitioner's "averaging" system does not result in discounts exceeding "per purchaser" cost savings. See Pet. A-40. ("... respondent takes the *over cost justification* in delivery to the large stores of a chain and credits this time saved to the smaller stores").

"earned." Section 2(a) is concerned with preventing a seller from paying a purchaser a non-cost justified discount; it is not concerned, we submit, with how a purchaser may divide up or use a cost justified discount once it is received.[12] Certainly, the important question of how voluntary and co-operative food chains shall be treated for cost justification purposes, as well as the vital question presented on this petition with respect to corporate chain purchasers, should not now be left in the limbo to which the government's brief would consign them.

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12. This case is quite unlike the so-called *Auto-Parts* cases, some of which were cited by the Court of Appeals (see Pet. A-13), where the cooperative and voluntary groups were "bookkeeping devices" for the collection of rebates from suppliers, and where there was no claim of cost justification. See, *e.g.*, American Motor Specialties Co. v. FTC, 278 F. 2d 225, 227 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960).

CONCLUSION

For all the reasons hereinabove set forth and in the earlier petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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